Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1588

FORD MOTOR CREDIT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Fort Motor Credit Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

There is no written opinion by the district court. The opinion of the court of appeals (Appendix A, *infra*, pp. A-1 - 3) is reported at 476 F. 2d 960, and its opinion on petition for rehearing and petition for rehearing en banc, which is not yet reported, is set forth in Appendix B, *infra*, pp. A-4 - 7).

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JURISDICTION

The judgment of the court of appeals was entered on April 19, 1973, and its order denying the petition for rehearing en banc was entered on March 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

1) Whether the United States has the statutory power under the forfeiture and remission statutes, 49 U.S.C. §§ 781, 782, and 19 U.S.C. § 1618, to forfeit an innocent lien-holder's interest in an automobile.

2) If the federal forfeiture and remission statutes permit forfeiture of an innocent party's interest, whether the statutes permit a taking of property without just compensation and without due process of law and are accordingly unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Fifth Amendment of the United States Constitution state:

> No person . . .shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Section 781 of 49 U.S.C. in pertinent part states:

> (a) It shall be unlawful . . . (3) to use any . . . vehicle . . . to facilitate the transportation . . . of any contraband article.
>
> (b) As used in this section, the term "contraband article"

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> means . . . (3) any . . . counterfeit coin or obligation of the United States. . . .

49 U.S.C. § 782 in pertinent part states as follows:

> Any . . . vehicle . . . which has been . . . used in violation of any provision of Section 781 of this title . . . shall be seized and forfeited. . . .

The federal remission statute, 19 U.S.C. § 1618 provides in pertinent part:

> Whenever any person interested in any . . . vehicle . . . seized under the provisions of this chapter . . . files with the Secretary of the Treasury . . . a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. . . .

STATEMENT

On July 15, 1971, Frank Bedford Green bought a used 1969 Plymouth Fury automobile from Myers Courtesy Ford, Inc., in Dallas. The purchase was financed through Ford Motor Credit Company (FMCC) which obtained a security interest in the automobile. Mr. Green made a $100 down payment and did not make any further payments pursuant to his loan agreement.

Subsequently, on August 14, 1971, Mr. Green was arrested by the U.S. Secret Service and charged with possession and

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concealment of 985 counterfeit Federal Reserve notes, in violation of 18 U.S.C. § 472. The automobile had been unlawfully used by Mr. Green to transport the counterfeit notes, and it was accordingly at the time of the arrest seized by the Secret Service agents acting pursuant to 31 C.F.R. Sec. 401.1-401.3 and 49 U.S.C. §§ 781, 782 (R. 3; 476 F. 2d 960).[1] Mr. Green was later convicted of violating 18 U.S.C. § 472.

After receiving notification of the seizure FMCC petitioned the Government for remission of the forfeiture and on November 16, 1971, was advised only that "the petition is denied." (R. 4) It is uncontroverted that Mr. Green was the registered title holder of the automobile at the time it was seized, that he unlawfully used it to transport contraband in violation of 49 U.S.C. § 781, and that

> "The total outstanding amount of FMCC's lien interest in the subject automobile exceeds the value of the automobile." (R. 4)

On May 2, 1972, the Government filed this lawsuit in accordance with 19 U.S.C. § 1608 seeking a judgment of forfeiture under 49 U.S.C. § 782. FMCC intervened in the action pleading facts establishing its lien interest and praying for possession of the automobile, remission of the forfeiture, and foreclosure of its security interest. The Government then moved for summary judgment and in support of its motion filed an affidavit and supporting exhibits establishing Frank Green's

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[1] The facts set forth in this statement are based upon the Agreed Statement on Appeal filed with the court of appeals under F.R.A.P. Rule 10(d) as the separately bound appendix, and the "R" references are to the appendix. In the lower courts this lawsuit was styled *United States v. One 1969 Plymouth Fury Automobile.*

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unlawful use of the automobile (R. 2). In opposition to the motion, FMCC filed the affidavit of its employee, Frank Boswell, who stated that he was the person responsible for verifying Green's credit application, that he had determined that Green had properly repaid an earlier auto purchase loan, that the Retail Merchant's Association in Dallas had no record of Green's credit activities, and that at the time he investigated (and ultimately approved) Green's credit he had no knowledge that Green was either a poor credit risk or had a criminal reputation (R. 4). In addition, FMCC submitted the affidavit of Rodney Robinson, its collection coordinator, who also described the investigation of Green's loan application and stated that the credit references revealed no suspicious evidence to warrant further investigation of Green's credit reputation and that FMCC was never aware nor had any knowledge at any time during its investigation that Green had a criminal record or reputation or was a commercially unreliable person. (R. 5)[2] FMCC alleged and contended that it was an innocent party not guilty of any violation of law and not alleged to have committed any negligent or otherwise wrongful act, and that notwithstanding Green's illegal use of the Plymouth the forfeiture of FMCC's lien interest was a taking of property without due process of law under the Fifth Amendment, and a denial of due process and equal protection because of the discriminatory application of the forfeiture penalty under 49 U.S.C. § 782. (R. 3) On August 3, 1972, the district court granted the Government's motion and entered summary

[2] There is, in fact, nothing in the record to suggest that at the time of the automobile purchase and financing Green indeed had a criminal reputation or record or was a poor credit risk or commercially unreliable.

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judgment reciting the elements of F.R.C.P. Rule 56 and granting the forfeiture.

The court of appeals affirmed the judgment, holding that forfeiture of the rights of an innocent lien holder was permitted under the forfeiture and remission statutes, that the Fifth Circuit's prior opinion in *United States v. One 1970 Buick Riviera,* 463 F. 2d 1168 (1972), *cert denied,* 409 U.S. 980, was controlling, and that *United States v. United States Coin and Currency,* 401 U.S. 715 (1971) "was inapplicable." (476 F. 2d 960, 961; Appendix A, *infra,* p. A-3). The court of appeals did, however, observe that it would be incongruous to treat an innocent lienor differently from an innocent record owner of a vehicle, and that in any event "It may even be said that the forfeiture is an anachronistic relic of deodand." (476 F. 2d 960, 961; Appendix A, *infra,* p. A-2).

FMCC petitioned for rehearing and for rehearing en banc, both of which were denied in a brief order citing *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974). Judge Wisdom, joined by five other members of the court, dissented on the merits and on the denial of the rehearing en banc. He discussed the *Coin* and *Pearson* cases and concluded that "in all forfeitures there is a *statutory* requirement that the party sustaining the penalty be guilty of some form of fault, intentional or negligent," and that this case raised the questions of the Government's "statutory or constitutional power to impose a penalty on an innocent party." Finally, he observed that the Government's rationale that "The vehicle is condemned as the offender" was

"barbaric, a vestigal relic of deodand. It is anomalous to

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treat an innocent lien-holder as harshly as the criminal owner of the automobile." (Appendix B, *infra*, p. A-7).

REASONS FOR GRANTING THE WRIT

FMCC submits that the holding of the court below erroneously failed to recognize that the federal forfeiture statutes are constitutionally infirm unless they are construed to require that the property owner be found to have been significantly involved in or aware of the criminal enterprise, or that the owner had failed to reasonably act to prevent the improper use of the property. The court of appeals' application and construction of the forfeiture and remission statutes conflicts with this court's opinions in the *Pearson* and *Coin & Currency* cases, and this lawsuit squarely presents the statutory and constitutional questions discussed in those cases and affords an opportunity to answer important questions remaining unresolved by *Pearson* and to provide guidance to the lower courts.

It should be emphasized that this case is an appeal from a summary judgment, and in its present posture the record furnishes uncontroverted and presumptively correct evidence that FMCC was innocent of any criminal act, had no involvement in Frank Green's counterfeiting activities, had no reason to know of his criminal activities or criminal propensities (if any), and had exercised reasonable and commercially prudent care before extending credit to Green. As Judge Wisdom pointed out in his dissent from the petition for rehearing en banc, the Government's position is not that FMCC failed to establish its innocence and good faith, but that the lienor's innocence or

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its reasonable conduct were wholly irrelevant to the Government's forfeiture rights. (Appendix B, *infra*, p. A-7) This reading of the statutes was followed by the lower court.

FMCC's position is that in the *Coin & Currency* case this Court put a judicial gloss on the federal forfeiture statutes so that when they are read with the remission statute, 19 U.S.C. § 1618,

> " . . . it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." 401 U.S. 715, 721-22.

In the absence of this construction, this Court observed, the statutory provisions would present "serious constitutional questions." *Coin*, at 700. This reading of the federal forfeiture statutes was reiterated in the *Pearson* case, which upheld a forfeiture under Puerto Rican statutes which did not contain any remission provisions. The Court though, then stated that:

> "This is not to say, however, that the 'broad sweep' of forfeiture statutes remarked in *Coin & Currency* could not, in other circumstances, give rise to serious constitutional questions."

and gave as an example of such 'other circumstances'

> "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that the forfeiture served legitimate purposes and was not unduly oppressive." *Pearson*, supra, 416 U.S. at 688.

FMCC urges that this lawsuit presents those 'other circumstances' mentioned in Pearson and that considering the

record before this Court a forfeiture of FMCC's lien interest in the Plymouth is contrary to the statutory requirements imposed by *Coin & Currency* and constitutes a taking of FMCC's property without due process of law and without just compensation.

The issues presented in this petition are of major importance to the conduct of law enforcement activities and to the commercial credit industry, and the facts of this lawsuit raise questions not only as to the constitutionally proper interpretation of the forfeiture statutes, but as to the evidentiary and procedural standards to be followed in the lower courts. Under the remission statute, 19 U.S.C. § 1618, FMCC properly and timely petitioned the Secretary of the Treasury for remission or mitigation of the forfeiture, and then timely appealed the adverse decision by filing a bond under 19 U.S.C. § 1608. The Government then filed its forfeiture lawsuit in federal district court and FMCC intervened. At no point has the Government alleged or offered proof that FMCC was anything but an innocent, unaware and non-negligent lender and allegations and evidence as to FMCC's conduct are found only in its own pleadings and affidavits. No summary judgment proof was offered by the Government to controvert FMCC's evidence of its innocent non-negligent conduct, and as pointed out above, the Government's position has been that FMCC's innocence has no bearing at all on the Government's rights to forfeiture.

As Mr. Justice Bradley stated in *Boyd v. United States*, 116 U.S. 616, 634 (1886), forfeiture proceedings "though they

may be civil in form, are in their nature criminal" and subject to the protections of the Fifth Amendment. Under the statutes, though, the burden of proof in a forfeiture lawsuit is on the claimant, provided that the Government first shows probable cause for the institution of the proceeding. 49 U.S.C. § 784, 19 U.S.C. § 1615. Where the claimant is also the accused criminal the probable cause requirement is satisfied when there is "a reasonable ground for belief of guilt." *Carroll v. United States,* 267 U.S. 132 (1925); see *United States v. One 1971 Chevrolet,* 496 F. 2d 210, (5th Cir. 1974). FMCC submits that in this summary judgment proceeding, where the Government has come forward with no pleading or evidence of the claimant's misconduct (negligent or criminal), the granting of the forfeiture has in effect denied FMCC the opportunity to be advised of the nature of any charges of misconduct or negligence on its part and the opportunity to present evidence in defense of its property interest, and further places the entire burden of proof on the claimant and none at all on the Government. The anomalous result is that the convicted criminal defendant, Frank Green, was afforded a full panoply of federal constitutional rights, see *Boyd v. United States, supra;* while Ford Motor Credit Company is denied these protections. In the court below Judge Wisdom, in dissent,[3] remarked that "It is anomalous to treat an innocent lien-holder as harshly as the criminal owner of the automobile," (Appendix B., p. A-7) and FMCC submits that the procedural and evidentiary burden cast

[3] Judge Wisdom, it should be noted, was a member of the original unanimous panel of the court of appeals in the proceedings below, 476 F.2d 960.

on the innocent lien-holder is not only anomalous, but is a denial of due process of law.

Neither this Court in *Pearson* or Judge Wisdom in his dissent in this case discussed the extent of the duty imposed on the owner or lienor to prevent misuse of the property. The scope of this duty raises serious questions for lending institutions throughout the United States.

FMCC filed affidavits in the district court describing its credit investigation of Frank Green and there is no suggestion that this investigation was inadequate or was otherwise negligently conducted, or that Frank Green in fact had any criminal record or reputation that could have been discovered. Nevertheless, what if Green was found to be reasonably creditworthy, but to also have a prior record of criminal convictions, or of criminal arrests? Would the extension of credit in those circumstances justify a finding that FMCC failed to exercise reasonable care to prevent the subsequent transportation of contraband in the financed automobile? And what if the prior convictions or arrests involved offenses or allegations unrelated to Green's later counterfeiting activities?[4] Did FMCC have a duty to reasonably determine Green's specific criminal propensities before extending credit to him? And perhaps more serious is the question of whether FMCC would be subject to any civil liabilities if it regularly denied credit

[4] Many arrests and convictions may not only be unreliable indicators of a propensity toward criminal conduct or criminal use of a vehicle, but may also be constitutionally suspect. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169, note 15 (1972).

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to persons with past records of convictions or arrests.[5] Further, a widespread denial by consumer finance agencies of the extension of credit to persons with past criminal records would be directly contrary to state and federal programs designed to rehabilitate persons convicted of crimes, reduce recidivism, and make it possible for convicted persons to eventually lead productive lives. If, as FMCC urges, this petition for certiorari is granted, and the judgment of the court below is reversed, the district court will presumably then be in a position to hear further evidence relating to the nature of FMCC's credit investigation[6] and petitioner accordingly suggests that it would in that event be appropriate for this Court to further define the standards by which its conduct is to be judged. A statutory policy designed to induce owners, lessors and lenders "to exercise greater care in transferring possession of their property," *Pearson, supra,* 416 U.S. at 688, is defeated (and the harsh penalty of forfeiture will indeed serve no legitimate purpose and be unduly oppressive) if the innocent owner or lienor has no prior notice of the standards of care applied in the forfeiture proceeding or if — as in this lawsuit — the forfeiture is imposed without *any* finding of fault or negligence.

The forfeiture of FMCC's interest in the Plymouth automobile purchased by Frank Green was contrary to the statutory standards imposed by this Court in the *Pearson* and *Coin*

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[5] Consideration of arrest records in connection with employment applications has been held to be a denial of equal employment opportunity to black persons. See *United States v. City of Chicago,* 385 F. Supp. 543 (N.D. Ill. 1975); *Gregory v. Litton Systems, Inc.,* 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified,* 472 F.2d 631 (9th Cir. 1972).

[6] FMCC presumes that there is no question about its lack of involvement in or awareness of Frank Green's counterfeiting activities.

& Currency cases. Without that "statutory gloss" the forfeiture renders the statutes subject to constitutional attack. Because of the importance of the questions raised by this lawsuit FMCC's petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this 16 day of June, 1975, three copies of the petition for writ of certiorari were mailed, postage prepaid, to Frank McCown, Esq., United States Attorney for the Northern District of Texas, 1100 Commerce Street, Dallas, Texas 75202, counsel for the respondent, and to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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